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No.

IN THE

Supreme Court of the United States

HUGH T. BUTLER, SR.,

Petitioners,

v.

GREIF, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a plaintiff is limited to amending his EEOC charge to correct a technical defect by adding a missing verification only if the charge is still pending before the EEOC.

LIST OF PARTIES

The parties below are Petitioner, Hugh T. Butler, Sr. and Respondents, Greif, Inc. and Michael Ogilvie, Jr.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is currently available at 2009 WL 928916 (C.A.11 (Ga.)). The Eleventh Circuit affirmed the September 26, 2008 decision of the United States District Court for the Northern District of Georgia, which is not reported in the Federal Supplement. *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit's opinion was entered April 8, 2009, no Petition for Rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Excerpts from Title 42 United States Code, Section 2000e-5(b):

Enforcement provisions.

> (b) . . . Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge

> (including the date, place and circumstances of the alleged unlawful employment practice) on such employer . . .within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.
>
> . . .

The provisions of 42 U.S.C. § 2000e-5 is lengthy and, therefore, set out in its entirety in Appendix C, pursuant to Supreme Court Rule 14.1(f). Relevant excerpts of the legislative history are set out in Appendix D, pursuant to Supreme Court Rule 14.1(h)(vi).

REGULATIONS INVOLVED

29 C.F.R. § 1601.9.

Form of charge.

Charge shall be in writing and signed and shall be verified.

Excerpts from 29 C.F.R. § 1601.12:

Contents of charge; amendment of charge.

(a) Each charge should contain the following:

. . .

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

STATEMENT OF THE CASE

1. Petitioner Hugh T. Butler, Sr. asserts in this case that he should not lose his statutory right to have his case determined on the merits because of the mere technicality of amending his EEOC charge after the expiration of the 90-day right to sue notice and the filing of his suit in district court.

2. Butler brings his present claim of retaliation based on Greif, Inc. terminating him on August 31,

2006, the day after his ADA jury trial ended in a Rule 50(a) motion.[1] Here the district court agrees with Greif that bending is not a "major life activity,"[2] preventing Butler from satisfying the first definition of disability.[3] Butler having worked for Greif since 1984, which included heavy lifting and repetitive bending of his back, his back injuries first appeared in 2001 at work, and because of a continuation of aggravation to his back, his doctor determines from a MRI a diagnosis of bulging disk and Degenerative Disk Disease in 2003. Upon learning of his chronic condition, Butler integrated his therapeutic exercises, safety practices, specially designed tools that he made in the shop, and other job aids provided by Greif to assist him with lifting of heavy equipment. By using these strategies, Butler performs his job without bending his back. Greif

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1. Plaintiff filed his initial action on November 30, 2004. Plaintiff's Complaint included six claims: disability discrimination and retaliation' under the Americans with Disabilities Act ("ADA"), constructive discharge under Title VII, negligent retention and/or supervision of employees under Georgia law, intentional infliction of emotional distress under Georgia law, and punitive damages.

2. Congress amended Title 42 U.S.C., Section 12102, and in its amendment, Congress revised the general definition of "major life activities," to include "bending" as a major life activity. 42 U.S.C.A. § 12102(2)(A).

3. However, according to the notes to the ADA Amendments Act of 2008, 42 USCA § 12101, Congress intended for the courts to give a broad interpretation of the statute, "Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage; . . ."

acknowledges its awareness of Butler's back injury and admits he continued to perform all of the essential functions of his job after his January 2003 FMLA leave until he went on vacation in August of 2004. The crux of the problem manifests itself in June of 2004 when Greif placed Butler on the relief roster to relieve press operators for lunch or break time. Butler, realizing that he could no longer endure the repetitive bending of his back as required for that position, he asks Greif to remove him from the roster, as there were adequate employees available already performing that task. Even though Greif admits that the press relief duty was a nonessential duty, it refused to relieve Butler of that duty. However, after Butler's doctor verifies a zero restriction on bending, Greif took the position that Butler is no longer able to perform the essential functions of his position as a machinist-electrician because "bending" is an essential job function. Despite Butler's demonstration during jury trial showing how he performed his essential duties without bending his back, the district court sided with Greif's unwritten declaration of "bending" as an essential function of the job. Hence, the district court grants the Rule 50(a) motion.

3. On or around February 22, 2007, Butler's counsel files a timely charge with the EEOC on his behalf. Butler alleges that on August 31, 2006, a day after jury trial ended, without giving him any opportunity to return to work from the leave of absence imposed by Greif, or otherwise giving any warning to Butler, Greif simply terminates him by

mail, allegedly pursuant to the terms of the collective bargaining agreement.

4. On May 22, 2007, the EEOC issues a Dismissal and Notice of Rights. In the Notice, the EEOC indicates that it is closing its file on Butler's charge by marking one of the generic boxes with each one representing one or more reasons. For Butler, EEOC checked the box that indicated a number of possible reasons, namely, for failure to provide information, for failure to appear or be available for interviews/conferences, or otherwise for failure to cooperate to the extent that it was not possible for EEOC to resolve the charge. Upon reviewing the Charge and the Right to Sue letter, Butler could see that the Charge itself consisted of background details explaining the basis of his dispute with Greif. For example, Butler presents the 2003 FMLA leave for his back injuries; the M.R.I. document showing his degenerative back condition; his doctor's therapeutic instructions; his work restrictions, including the "0" bending restriction; the break relief issue. Butler discuses the prior EEOC Charge No. 110-2004-04330; the prior lawsuit in the district court with case number; the three-day trial and its outcome; and his appeal to the Eleventh Circuit, Case No. 06-15274-BB. EEOC being only a computer link away from the district court's records and only about 90 days into its investigation duty, Butler concludes that the EEOC simply was not interested in investing any time into such a heavily litigated matter and decided to wash its hands of the case and let the parties continue with litigation in

district court. Instead of pursuing EEOC on its reasoning, Butler complies with the 90-day notice by timely filing his lawsuit in the district court. It is noteworthy to state that EEOC did not mention a lack of verification as a reason, which it could have done under option of "Other" on the dismissal and notice form.

5. Defendant chooses to wait until the summary judgment stage in the district court to raise the lack of verification as a defense to Butler's right to bring his claim in the district court.

6. On August 17, 2007, Butler filed the instant case against Greif and Ogilvie.

7. On March 13, 2008, Greif and Ogilvie file their motions for summary judgment. Butler is not complaining about the summary judgment granted to Ogilvie. Greif argues that the charge against Greif should be dismissed because Butler did not submit a verified charge to the EEOC.

8. On March 25, 2008, Butler's counsel filed an amended EEOC charge to add the missing verification. On April 7, 2008, Butler responded to Greif's motion for summary judgment, denying that he had not verified his EEOC charge and contending that on March 25, 2008, his counsel submitted to the EEOC an amended charge with the required verification, and that this amended charge relates back to the original date of filing.

9. Greif contends that Butler's amended EEOC charge cannot relate back to the date of original filing because Butler submitted it to the EEOC long after the EEOC closed its file and Butler received a right to sue notice.

10. On September 25, 2008, the district court Grants a summary judgment to Greif based on the Eleventh Circuit's holding in *Vason v. City of Montgomery, Alabama*, 240 F.3d 905, 907 (11th Cir.2001)(upholding grant of summary judgment where the plaintiff's EEOC charge was not under oath or affirmation and she never attempted to amend it to include the verification). Although Butler attempted to amend his charge, the district court discounts that effort by alluding to alleged prejudice to Greif because of the notation on the dismissal and notice of right to sue indicating EEOC was closing its file because Butler failed to provide information or cooperate with the EEOC to enable it to resolve the charge.

11. Petitioner filed his Notice of Appeal on October 24, 2008. The Eleventh Circuit's decision was entered on April 8, 2009. Petitioner now files his Writ of Certiorari to the U. S. Supreme Court, his final appeal.

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING EEOC 29 C.F.R. § 1601.12(b)

A. Application of 29 C.F.R. § 1601.12(b) To Correct Technical Defects

In the statute, 42 U.S.C. § 2000e-5(b), Congress omits a filing deadline for verifying charges. The statute makes no mention of any special circumstances such as amending the charge to add a missing verification. In carrying out its enforcement duties, the EEOC enacted a regulation that allows certain technical defects in charges to be corrected by amendment, including adding a missing verification. This Court in *Edelman v. Lynchburg College*, instructs that the verification requirement is a technical rather than substantive provision, more in the nature of the signature requirement under Federal Rule of Civil Procedure 11. 535 U.S. 106, 116, 112 S.Ct. 1145, 1151 (2002). However, the regulation, like the statute, contains no filing deadline to amending the charge to add this missing verification. This Court upholds the validity of the regulation, stating in *Edelman* that "We accordingly hold the EEOC's relation-back regulation to be an unassailable interpretation of § 706." 535 U.S. 106, 118, 112 S.Ct. 1145, 1152 (2002). Despite the broad language of the statute and the regulation, since this holding, lower courts have undertaken to find ways

to read in a filing deadline for amending the charge to add a missing verification. Apparently, Congress have been listening to the discourse among the courts and parties alike, for in September 2008, Congress passes an amendment to the Americans with Disabilities Act of 1990 ("ADA"). In one of the Congressional findings, Congress states that in passing the Act of 1990, "Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage." *See* Appendix D, at 36a. In January 2009, Congress passes *The Lilly Ledbetter Fair Pay Act of 2009*, to amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. It is important to note that in the Congressional Findings, Congress takes care to clarify what it is not intending, namely, that "With regard to any charge of discrimination under any law, nothing in this Act [The Lilly Ledbetter Fair Pay Act] is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination." *See* Appendix D, at 35a. Butler asserts that after having been made aware over the years through various courts' decisions concerning the absence of a filing deadline in relation-back regulation, if Congress' original intent is to narrow the reach of the regulation, it could have taken the opportunity to

reiterate this intent when it amended Title VII and the ADA during 2008 and 2009. Instead, Congress reiterates its intent to provide broad coverage to ADA complainants. It seems reasonable to infer from Congress' recent actions that the EEOC relation-back regulation is doing just what Congress intends for it to do—allow complainants to correct technical defects whenever they are discovered, regardless of whether it occurs before or after the right to sue notice or after the filing of suit in court.

Despite this broad regulation, the Eleventh Circuit, along with others, is reluctant to give the regulation its full effect in circumstances where a plaintiff has failed to verify his EEOC charge before filing it with the EEOC and attempts to correct this technical defect after the right to sue notice and after filing suit in district court. The Eleventh Circuit's disregard for Congressional intent, to provide the ADA complainant broad coverage on the relation-back regulation, presents a substantial issue justifying Supreme Court review.

B. The Eleventh Circuit's Holding That Pending EEOC Charge Is Required To Correct Technical Defect Is An Impediment To Enforcing Congress' Intent to provide broad coverage Under ADA.

In this present petition, the Eleventh Circuit holds that a charge must be pending before the EEOC for an amendment to be valid. *Butler v. Greif,*

Inc., 2009 WL 928916, at *3 (11th Cir.(Ga.) Apr 08, 2009). The Fourth Circuit is in accord. *Balazs v. Liebenthal*, 32 F.3d 151, 156-58 (4th Cir.1994) (allowing EEOC charge to be amended and for amendment – verification – to relate back only so long as the charge is a viable one in the EEOC's files).

These circuits have seized upon dicta in this Court's opinion in *Edelman v. Lynchburg College*, 535 U.S. 106, 112 S.Ct. 1145 (2002), to imply a deadline for correcting technical defects, even though neither Congress nor the EEOC has done so. Specifically, in expounding upon the object of the verification requirement as offering protection to employers, this Court states, "This object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC." 535 U.S., at 113, 112 S.Ct. 1149. However, this is not the whole picture. This Court interlinks the completion of the oath requirement with the timing of EEOC's request to employers for a response to the charge, indicating that "the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied," 535 U.S., at 115, 122 S.Ct. 1150. The EEOC gives its assurance to this Court that "The general practice of EEOC staff members is to prepare a formal charge of discrimination for the complainant to review and to verify, once the allegations have been clarified. 535 U.S., at 115, n.9, 122 S.Ct. 1150. However, EEOC's workload is

legendary and constantly challenges EEOC to complete its duties timely. In a memorandum to its staff, EEOC admits that there is still a problem with meeting its statutory duty of giving employers notice of charges within ten days, under both Title VII and the ADA. In response to this challenge, EEOC instructs its staff that

> if it appears that a perfected charge cannot be docketed and served within ten days of receipt of a correspondence meeting the minimal requirements of a charge, be it a letter or intake questionnaire, staff must take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent within ten days of receipt. Intent can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter. Staff should send respondent notice by mailing a Form 131 accompanied by the charge or by mailing only Form 131 (in situations where sending the charge 'would impede the law enforcement function of the Commission.'

See Petitioner's Appendix E, at 41a. In the present case, the record is not fully developed, since the

district court granted Greif's motion to stay discovery.

What the record does show is that in its dismissal and notice of rights to Butler, EEOC marks a block on the form indicating the following: "Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." *See* Petitioner's Appendix F, at 44a. Here, there is no mention of the verification requirement in what is obviously a collection of conclusory options without any indication of which one is implicated. Another indication of the EEOC's workload challenge is that this dismissal and notice of rights is issued within ninety days of Butler filing his unverified charge. A review of the charge shows it is filled with details of the type required by 42 U.S.C. 2000e-5(b); for example, pertinent background facts concerning Butler's employment history; circumstances that led Butler to filing his first EEOC charge No. 110-2004-04330; identification of first suit in district court by Case No. 1:04-CV-3502-ODE and outcome of suit based on Greif's Rule 50(a) motion; the termination of Butler the next day after the Rule 50(a) judgment; and that Butler is appealing the summary judgment to the Eleventh Circuit, Case No. 06-15274-BB. Clearly, more than sufficient information is provided in the charge that it is difficult to understand why EEOC is feeling unable to launch and complete its investigation. Thanks to the Pacer Service, (that

provides on-line access to U.S. Appellate, District, and Bankruptcy court records and documents nationwide), EEOC is only a computer key away from additional detailed documents and can get them much quicker than a complainant trying to figure what it needs. Since access to additional information in Butler's the type of retaliation charge is a matter of court record, it is logical to conclude that the workload challenge impacted EEOC's decision to dismiss Butler's charge and issue right to sue notice. However, Greif, as any enterprising defendant would do, seizes an opportunity to build a defense and create an appearance of prejudice and both the district court and the appellate court accepted it without requiring any independent showing by defendant of prejudice. See Petitioner's Appendix F, at 46a-50a. Butler believes that for this Court to allow the Eleventh Circuit's position to stand would be simply opening a floodgate to employers lying in wait until in district court to launch this "protection of employers" defense.

C. The Eleventh And Fourth Circuits Conflict With Third Circuit's Holding Employer Can Waive Right To Use Absence Of Verification As Defense In Suit.

Contrary to the "pending before EEOC" line of cases, the Third Circuit, in *Buck v. Hampton Township School District*, allows a discrimination suit under the ADA to proceed where the plaintiff failed to verify her charge prior to suit. 452 F.3d 256

(3d. Cir. 2006). There the court finds that because the employer received a notice and copy of the unverified EEOC charge prior to the lawsuit and responded to it on the merits without raising the issue that it was unverified, the employer waived its right to assert in court plaintiff's failure to verify the charge as a bar to suit. *Id.* at 262.

D. The Eleventh And Fourth Circuits Conflict With Ninth Circuit's Holding Late Verification After Notice Of Right To Sue Not Prejudicial to Employer

Although not for the same reason as the Third Circuit, the Ninth Circuit is not in harmony with the Eleventh and Fourth circuits. In *McWilliams v. Latah Sanitation, Inc.*, the Court holds that a plaintiff should be allowed to file a late verification of his charge, even after the EEOC has issued a right to sue notice, because the employer received adequate notice of the charge and would not be prejudiced by the late verification. 149 Fed. Appx. 588, 590 (9th Cir. 2005). Butler's district court, and the Eleventh Circuit agrees, concludes that because the EEOC mark on its dismissal form the allegation of failure to cooperate (without indicating specifically which option or options it was referring to), that to allow Butler to verify the charge at this late stage would defeat the purposes of the verification requirement and would prejudice Greif. However, it is questionable whether the EEOC anticipated that employers would take this conclusory allegation

from its dismissal and notice of rights form and use it to get a plaintiff's case obliterated on a summary judgment motion. Butler believes this is true because in February of 2008, EEOC removed that dismissal reasoning, along with others, from the form, as is noted in a blank form in the appendix. It is doubtful that such reasoning would be valid under the statute. Specifically, 42 U.S.C. § 2000e-5(f)(1) provides that

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge by the person claiming to be aggrieved.

Here, Congress does not place any additional duty on EEOC to sort through reasons for dismissal or otherwise prioritize reasons for dismissal, but only

instructs the EEOC that if the charge is dismissed under subsection (b) and the Commission has not filed a suit, then give the complainant ninety days to file suit on its own behalf. Butler asserts this is partly why the EEOC removes that allegation of failure to cooperate from its form in February 2008, as it is inconsistent with the statute and its own regulation, in addition to removing possible temptation for EEOC to abuse the use of such allegation to reduce its caseload.

E. The Eleventh And Fourth Circuits Conflict With Seventh Circuit's Holding District Court Should Treat Omission Of Oath As A Permissive Waiver By the Commission.

In the final analysis, the Seventh Circuit's interpretation of the relation-back regulation harmonizes better with the statute. 42 U.S.C. § 2000e-5(b) provides that

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer within ten days, and shall make an investigation thereof. Charges shall be

> in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

In the language of the statute, the first two duties that Congress instructs the EEOC to perform after a charge is filed is to send out a *notice of the charge within ten days and make an investigation of the charge.* [emphasis added] Note, Congress does not say send out a notice of only a "verified" charge or investigate only a "verified" charge. The only direction given concerning the oath follows the first two duties. Here Congress states, "Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." There is no relationship between sending out the notice and beginning the investigation and the charge being under oath. At some point, Congress requires the EEOC to have the charge perfected with an oath or affirmation; since Congress does not designate that point in time, logically, Congress expects the EEOC to fill in the details. The EEOC follows with a regulation that allows technical defects to be corrected in the charge at any point in time by amendment. This regulation is in complete harmony with the statute and this Court confirms this position in *Edelman.* In view of recent amendments to Title VII and the ADA, Butler asserts that the statute does not necessarily require an interpretation that the oath is primarily for employers' protection. It is just as reasonable to interpret the oath for the benefit of the EEOC's

administrative process, to satisfy EEOC's state of mind that the charge is not frivolous before sending out the notice and launching its investigation.

However, because of years of experience, EEOC knows what to look for and if certain factual indicia are apparent in the charge, there is no need for EEOC to wait for verification before sending out the notice and launching its investigation—its state of mind is satisfied. After all, the parties know and EEOC knows that, for charges alleging egregious violations and substantial damages, the likelihood of a settlement is small and that the true battle is in district court, more precisely, the discovery process and the summary judgment motion. Therefore, the Seventh Circuit is correct that "the 'under oath' requirement relates to the administrative procedures which are conducted by the Commission and which precede any court action." *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359-360 (7th Cir. 1968). There is no need for the Commission to referee between employers' lawyers and complainants' lawyers because that is the function of the district court. In its Appellee's brief, Greif elaborated on how it felt compelled to maintain any possible defenses accruing from the omitted verification, to the extent that it did not reveal in district court what it received from EEOC or not. *See* Appendix F, at 56a-62a. However, from looking at the right to sue notice, it is evident that Greif's lawyer is copied and it can be inferred that earlier communication occurred between EEOC and Greif's lawyer. *See* Appendix F, at 43a-46a.

In the eyes of defense, it is all about winning not about assisting the EEOC to arrive at the truth and find a reasonable conciliation. It is interesting to note that there is no corresponding duty on the part of employers to place their position statements, that is, their responses to the charge, under oath. Where the protection for the employees to make sure EEOC is receiving the truth from employers so that employees do not have to incur the expense of litigating in district court to show pretext? After all, employees have far less financial resources to litigate, as employers often terminate them or force them to resign, and this is no small point lost on employers' lawyers. It is indeed a huge challenge for employees, financially and emotionally, to attempt to vindicate their Title VII and ADA rights against employers with well-oiled and finely tuned defense teams.

This is why Congress reiterated its intent in enacting the ADA is to "'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage." *See* Appendix D, at 36a. Congress in particular criticized this Court's holdings in two cases concerning the ADA matters, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). *Id.* at 37a. Congress even criticized the EEOC: "Congress finds that the current Equal Employment Opportunity Commission ADA

regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard." *Id.* at 37a-38a.

It is clear that Congress thoroughly reviewed pertinent statutes, including 42 U.S.C. § 2000e-5, and EEOC's regulations. If Congress had wanted to make any changes in the broad language concerning "oath and affirmation" or concerning the broad language of amending technical defects in 29 C.F.R. § 1601.12(b), it could have done so with the same clarity that it reiterated its intent concerning the ADA. Perhaps it is time for the courts to accept what Congress says by its broad language and what the Commission interprets by its broad regulation—technical defects including verifying a charge can be corrected at any time such defects are discovered, whether before the EEOC or not or in district court. In *Edelman*, when a respondent argues that the employer will be prejudiced because there would be no deadline for verifying a charge, this Court said, "But this is not our case," and now it is. 535 U.S., at 115, 112 S.Ct. 1150.

Thus, certiorari is warranted to resolve a split between the Eleventh Circuit and circuits of like mind, and the other circuits as to whether the relation-back doctrine afforded by 29 C.F.R. § 1601.12(b) may be limited to only those charges that are amended to add missing verification that are pending before the EEOC.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

SANDRA JACKSON SHEPPARD
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I. OPINIONS OR ORDERS

APPENDIX A

*1 [DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.08-16104
Non-Argument Calendar

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 8, 2009
THOMAS K. KAHN
CLERK

D. C. Docket No. 07-01978-CV-ODE-1

HUGH T. BUTLER, SR.,
Plaintiff-Appellant,

versus

GREIF, INC.,
MICHAEL OGILVIE, JR.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 8, 2009)

Before TJOFLAT, BLACK and BARKETT, Circuit Judges. PER CURIAM:

*2 This is an employment discrimination case, brought by Hugh T. Butler, Sr., against his former employer, Greif, Inc. ("Greif'), under the anti-retaliation provision of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12203(a).[1] The district court granted Greif summary judgment because Butler failed properly to file a charge with the Equal Employment Opportunity Commission ("EEOC"). He now appeals.

Prior to bringing this lawsuit, Butler had to file a charge with the EEOC under oath or affirmation. 42 U.S. C. § 2000e-5(b). Butler's charge, which was submitted by his attorney, was not verified at the time it was filed; nor was it verified while the charge was pending before the EEOC. Butler argues that his attorney's signature on the charge was sufficient and that, if not, he could cure the lack of verification even after the EEOC dismissed his case for failing to cooperate. He also argues that Greif waived its right to challenge the lack of verification.

Before filing suit under the ADA, a plaintiff must exhaust his administrative remedies by filing a charge with the EEOC. See 42 U.S.C. § 12117(a)

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[1] Butler also sued his supervisor, Michael Ogilvie, Jr. He subsequently conceded that Ogilvie was not amenable to suit under the ADA because employers only are liable under the ADA. Thus, the district court properly entered summary judgment for Ogilvie.

(applying remedies and procedures of Title VII to ADA); Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001) (stating that exhaustion requires the timely filing *3 of a discrimination charge with the EEOC). An EEOC charge must be verified, meaning that it must be "sworn to or affirmed . . . or supported by an unsworn declaration in writing under penalty of perjury." 29 C.F.R. § 1601.3(a). The verification requirement is mandatory. See Vason v. City of Montgomery, 240 F.3d 905, 907 (11th Cir. 2001).

Although the applicable regulations allow charges of discrimination to be filed on behalf of a person, see 29 C.F.R. § 1601.7(a), the regulations do not dispense with the requirement that a plaintiff verify the facts supporting a claim. 29 C.F.R. § 1601.9. While an attorney may file an EEOC charge on behalf of a client, the attorney's signature alone will not constitute verification if the attorney does not personally swear to the truth of the facts stated in the charge and does not have personal knowledge of those facts.[2]

In certain situations, the EEOC regulations permit an otherwise timely charge to be verified or amended after the time for filing has expired, but the deadline to verify is the time the employer is obliged to respond to the EEOC charge. Edelman v. Lynchburg

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[2] In Vason, we expressly rejected the argument that the EEOC is obligated to inform a plaintiff of deficiencies of his charge, such as the lack of verification. 240 F.3d at 907.

College, 535 U.S. 106, 113, 115-18, 122 S.Ct. 1145, 1149-52, 152 L.Ed.2d 188 (2002); 29 C.F.R. § 1601.12(b). Where a right to sue letter has issued, the plaintiff has brought suit, and the EEOC has closed its *4 file, there is no longer a charge pending before the EEOC that is capable of being verified. See Balazs v. Liebenthal, 32 F.3d 151, 156-58 (4th Cir.1994) (allowing EEOC charge to be amended and for amendment – verification – to relate back only so long as the charge is a viable one in the EEOC's files).

At least one Circuit, the Third Circuit in Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256 (3rd Cir. 2006), has held that the verification requirement should be subject to waiver "when equity so requires," such as when, as in that case, the employer responded to the EEOC charge on the merits, declined to challenge the sufficiency of the charge before the EEOC, and later attempted to move to dismiss the suit for lack of verification. Buck, 452 F.3d at 262-65 (noting that the waiver rule would apply very sparingly). Id. at 265. However, the plaintiff's failure to cooperate with the EEOC disentitles that person to equitable relief. See Forehand v. Florida State Hosp. at Chattahoochee, 89 F.3d 1562, 1570 (11th Cir. 1996).

Here, Butler's attorney's signature did not constitute a verification. The deadline to verify the EEOC charge was while the charge was pending before the EEOC. Butler, though, did not verify it until after the EEOC had dismissed his case.

Lastly, Butler's failure to cooperate with the EEOC disentitled him to any equitable relief.

AFFIRMED.

APPENDIX B

*1 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HUGH T. BUTLER, SR.,
Plaintiff
v. CIVIL ACTION NO.
GREIF, INC., ET AL., 1:07-CV-1978-ODE
Defendants.

ORDER

This case, brought under the anti-retaliation provision of the Americans with Disabilities Act ("ADA"), 42 U .S .C . § 12203, is before the Court on Defendants' motion for summary judgment . [Doc . #17] Defendants contend that Defendant Robert Michael Ogilvie, Jr . ("Ogilvie"), an individual, is not a proper defendant under the ADA anti-retaliation provision and that Plaintiff failed to file a verified charge with the U.S. Equal Employment Opportunity Commission ("EEOC"), thus barring his suit against Defendant Greif, Inc. ("Greif"). [Doc. #17]. Plaintiff filed a response in opposition to Defendants' motion, opposing summary judgment as to Defendant Greif, but consenting to judgment as to Defendant Ogilvie. [Doc. #18, at 4]. Defendants have

filed a reply in response to Plaintiff's opposition. [Doc. #21]. For the reasons stated below, Defendants' motion for summary judgment is GRANTED. [Doc. #171.

I. Factual and Procedural Background

The following facts are undisputed unless otherwise noted.

*2 Plaintiff Hugh T. Butler, Sr. ("Butler") is a former employee of Defendant Greif. [Doc. #17-7; Doc. #17-8 1 Defendant Ogilvie supervised Butler at Greif. [Doc. #17-7; Doc. #17-8]. As described below, the parties in the immediate case have been before this Court in a prior case, Butler v. Greif Brothers Service Corp., No. 1:04-cv-03502-ODE ("Butler I").[3] The immediate case stems in part from the events in the prior case.

A . Butler I[4]

On November 30, 2004, Plaintiff filed suit in this Court against Greif, Ogilvie, and Darlene McGinnis ("McGinnas"), the Regional Human Resources Manager at Greif, for disability discrimination under the ADA, constructive

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[3] In its answer to Plaintiff's original Complaint in Butler I, Defendant Greif states that "Greif, Inc." was named incorrectly in the Complaint as "Greif Bros. Service Corp." [Case No. 1:04-CV-03502-ODE ("Butler I"), Doc. #3, at 11.

[4] The procedural and factual history of Butler I is derived in part from this Court's order on March 29, 2006 granting the defendants in that case summary judgment in part and denying summary judgment in part . [Butler I, Doc. #56.]

discharge under Title VII of the Civil Rights Act of 1964 ("Title VII"), negligent retention and/or supervision of employees under Georgia law, intentional infliction of emotional distress under Georgia law, and punitive damages . [Butler I, Doc. #56, at 7]. On February 2, 2005, Plaintiff amended his complaint to include a claim of retaliation under the ADA . [Butler I, Doc. #10]. On August 30, 2005, the defendants in Butler I moved for summary judgment as to all claims . (Butler I, Doc. #56, at 7]. On March 29, 2006, this Court granted summary judgment in defendants' favor on all counts *3 with the exception of Plaintiff's claim of ADA discrimination against Greif. [Butler I, Doc. #56, at 29]. The Court also held that because the ADA provides for only employer liability, not individual liability, the only proper defendant in Plaintiff's ADA claims was Greif, not Ogilvie or McGinnis . [Butler I, Doc. #56, at 11, 18].

On August 28-30, 2006, a jury trial was held in connection with Plaintiff's discrimination claim. On August 30, 2006, this Court granted the defendants' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), dismissing the action on the merits and ordering Plaintiff to pay defendants' costs in the action. [Butler T, Doc . #104]. Plaintiff appealed the case to the United States Court of Appeals for the Eleventh Circuit. On April 30, 2007, the Eleventh Circuit affirmed. Butler v. Greif Bros. Serv. Corp., 231 Fed. Appx. 854 (11th Cir. 2007).

B. Plaintiff's Discharge, EEOC Charge, and "Butler II"

On or around February 22, 2007, Plaintiff's counsel filed a charge with the EEOC on Butler's behalf, alleging that on August 31, 2006, a day after this Court rendered its verdict in favor of Greif in Butler I, Greif sent a letter to Plaintiff terminating his employment. [Doc. #17-9, at 3]. In the charge, Plaintiff alleged that he was discharged in retaliation for bringing his original suit under the ADA. [Doc. #17-9, at 3]. The EEOC charge was filed only against Greif and did not include a verification of the allegations under oath. [Doc. #17-9].

On May 22, 2007, the EEOC issued Plaintiff a Dismissal andNotice of Rights. [Doc. #1., at 11-12]. In the Notice, the EEOC *4 indicated that it was closing its file on Plaintiff's charge, with a box checked next to the following reason: "Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." [Doc. # 1, at 11.

On August 17, 2007, Plaintiff filed the instant case against Defendants Greif and Ogilvie, alleging retaliation under the ADA in connection with his discharge on August 31, 2006 ("Butler II"). [Doc. #1]. Defendants answered, asserting, among other defenses, that Plaintiff failed to exhaust his administrative remedies because he failed to submit a verified charge and to cooperate with the EEOC's investigation. [Doc. #9, at 2].

On March 13, 2008, Defendants moved for summary judgment and to stay discovery pending the resolution of the motion, contending that Ogilvie is not a proper defendant because he was not Plaintiff's employer and was not named in the EEOC charge.[5] [Doc. #17-5, at 4-5]. In addition, Defendants argue that the charge against Greif should be dismissed because Plaintiff did not submit a verified charge to the EEOC. [Doc. #17-5, at 5-9]. In their statement of material facts, Defendants assert that neither Plaintiff nor his counsel verified the EEOC charge. [Doc. #17-2].

On March 25, 2008, Plaintiff's counsel re-submitted the retaliation charge to the EEOC, attaching the required verification of the charge by Plaintiff's counsel. [Doc. #20, at *5 4-8]. On April 7, 2008, Plaintiff responded to Defendants' motion for summary judgment, denying that he had not verified his EEOC charge and contending that on March 25, 2008, his counsel submitted to the EEOC an amended charge with the required verification, and that this amended charge relates back to the original date of filing. [Doc. #19]. Plaintiff admitted all of Defendants' other material facts. [Doc. #19]. Plaintiff filed the amended EEOC charge as an attached exhibit to the Declaration of Plaintiff's Counsel in Opposition to Defendants' Motion for Summary Judgment. [Doc. #20, at 4-8]. Plaintiff did not submit any additional statement of material facts. On April 9, 2008, Defendant submitted a reply in response to Plaintiff's opposition to summary judgment. [Doc.

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[5] This Court has granted Defendants' motion to suspend discovery pending a resolution of their motion for summary judgment. [Doc. #24].

#21]. Defendants contend that Plaintiff's amended EEOC charge cannot relate back to the date of original filing because Plaintiff submitted it to the EEOC long after the EEOC closed its file and Plaintiff received a right to sue notice. [Doc. #21].

II. Standard of Review

The Court will grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). "A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To be ***6** material, a fact must be identified by the controlling substantive law as an essential element of the non-moving party's case. Anderson v . Liberty Lobby, Inc ., 477 U.S. 242, 248 (1986). Furthermore, the issue must be genuine; summary judgment will not be granted if there is not "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249. In reviewing the record, the district court must construe the facts and make all reasonable inferences in favor of the non-moving party. Id. at 255; Reese v. Herbert, 527 F.3d 1253, 1271 (11th Cir. 2008).

III. Discussion

A. Defendant Ogilvie

Because Defendant Ogilvie cannot be held liable as an individual under the ADA's anti-retaliation provision, 42 U.S.C. § 12203, the Defendants' motion for summary judgment as to Defendant Ogilvie is granted. [Doc. #17]. The ADA provides for employer liability for retaliation, but not for individual liability. Albra v. Advan, Inc., 490 F.3d 826, 834 (11th Cir. 2007) (holding that individual liability is precluded under 42 U.S.C. § 12203 where the act or practice opposed by the plaintiff is made unlawful by Subchapter I of the ADA, which governs discrimination by a private employer). Furthermore, Plaintiff did not name Ogilvie in either his original or his amended EEOC charge. [Doc. #1, at 8; Doc. #20, at 51.

B. Exhaustion of Remedies: EEOC

Defendants have also moved for summary judgment as to Defendant Greif, arguing that because Plaintiff failed to file a properly verified charge in front of the EEOC in a timely fashion, *7 he cannot now maintain his suit against Greif. Plaintiff argues that under the Supreme Court authority of Edelman v. Lynchburg College, 535 U.S. 106 (2002), and Scarborough v. Principi, 541 U.S. 401 (2004), his amended EEOC charge, filed on March 25, 2008 with the proper verification, relates back to the date of his original EEOC filing of February 22, 2007. Defendants contend that because Plaintiff waited to file this amendment until after the EEOC closed its file on the charge and issued a notice of right to sue, Plaintiff's verified charge

cannot relate back to the date of filing of his original charge.

1. Verification as a Prerequisite to Suit

Before suing an employer for retaliation or discrimination under the ADA, a plaintiff must first file a charge with the EEOC within 180 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1); see 42 U.S.C. § 12117(a) (providing that the remedies of 4 2 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 govern the enforcement of the ADA). The EEOC charge must be "verified," meaning that it "shall be in writing under oath or affirmation." 42 U.S.C. § 2000e-5(b). The Eleventh Circuit has held that the submission of a verified charge to the EEOC is a prerequisite to filing suit in district court. Vason v. City of Montgomery, Alabama, 240 F.3d 905, 907 (11th Cir. 2001) (upholding grant of summary judgment where the plaintiff's EEOC charge was not under oath or affirmation and she never attempted to amend it to include the verification).

2. Amendment of EEOC Charge and Relation Back

The EEOC regulations provide that a plaintiff can amend an EEOC charge for technical errors, including the lack of a proper *8 verification, and that the amendment relates back to the filing date of the original EEOC charge. 29 C.F.R. § 1601.12(b) ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . Such amendments . . . will relate back to the date the charge was first received"). In Edelman v. Lynchburg College, the Supreme Court upheld this

regulation as a valid interpretation of the statute. 535 U.S. 106, 115 (2002). In Edelman, the appellant faxed a letter to the EEOC alleging employment discrimination within the time period required, and, three days after the deadline passed, the appellant sent his verification to the EEOC. Id. at 109-10. The EEOC then completed its investigation and issued a notice o f right to sue. Id. at 110. The Court found that it was reasonable for the EEOC to allow a filer to amend his otherwise timely charge to include a proper verification after the time limit for filing the charge had expired:

> Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.

Id. at 115. In response to the defendant's argument that the relation-back rule would prejudice employers because there would be "no deadline for verifying a charge," the Court stated: "this is not our case, which simply challenges relation back per se, and our understanding is that the EEOC's standard practice is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further with the complaint." Id. at 115 n.9.

*9 In Edelman, the plaintiff filed his amendment prior to receiving a notice of right to sue and prior to the EEOC's closing of the file. Edelman did not address the issue which is now before the Court: whether Plaintiff can amend his EEOC charge to include a verification not only after the time period for filing an EEOC charge has expired, but also ten months after the EEOC has closed its file and issued a notice of right to sue, seven months after Plaintiff filed suit, and almost two weeks after Defendants moved for summary judgment. The Court finds that Plaintiff's amended EEOC charge cannot relate back to his original EEOC filing under these circumstances. While the Eleventh Circuit has not yet addressed the specific issue in this case, several other courts have held that where a plaintiff amends an EEOC filing to correct a technical defect after the EEOC has issued a right to sue letter and closed its file, the amendment cannot relate back to the date of the original filing because "there is no longer a charge pending before the EEOC which is capable of being amended." Balazs v. Liebenthal, 32 F .3d 151, 157 (4th Cir. 1994); Danley v. Book-of-the-Month Club, Inc., 921 F. Supp. 1352, 1354 (M.D. Penn. 1996) (holding that it is not possible for a plaintiff to verify a previously unsworn charge after the EEOC has issued a right to sue letter and closed its file), aff'd without opinion, 107 F.3d 861 (3d Cir. 1997); Hazeur v. Fed. Warranty Serv. Corp., No. Civ.A. 99-3156, 2000 WL 365013, at *2 (E. D. La. Apr. 7, 2000) (holding that a plaintiff's amendment to her EEOC discrimination charge does not relate back where the EEOC issued a right to sue notice, the EEOC terminated its processing of the charge, and a suit was initialed); Bacon v. *10 Allstate Ins. Co., No. 93

C 1701, 1995 WL 360736, at *7-*8 (N.D. Ill. Jun. 14, 1995) (holding that an EEOC charge cannot be verified after the EEOC has issued a right to sue letter); see also Reynolds v. Solectron Global Serv., 358 F. Supp. 2d 688, 693 n.9 (W.D. Tenn. 2005) (noting in dicta that a plaintiff cannot amend an EEOC charge where the notice of right to sue issued and no charge was pending that could be amended).

The facts in Balazs are similar to this case. In that case, the plaintiff's counsel attempted to amend an EEOC charge to add a verification four months after the EEOC had terminated its processing of the charge and had issued a right to sue letter. The plaintiff had already instituted a lawsuit in federal court and had been served with defendants' motion to dismiss based on the non-verification of the EEOC charge. 32 F.3d at 157. The Fourth Circuit found that allowing relation-back in that scenario would defeat the purpose of the verification requirement, which is to protect the employer from being required to respond to frivolous charges, and would result in there being no limitation on the time in which a plaintiff must verify his charge. Id. at 157.

The reasoning of Balasz is especially persuasive here because Plaintiff waited almost a year after receiving a right to sue letter from the EEOC before filing an amended charge, and did so only after Defendants filed a motion for summary judgment. Because the EEOC long ago closed its files on Plaintiff's case, there is no longer a charge in front of the EEOC to amend, and Plaintiff's charge was not properly verified. Because *11 verification of

an EEOC charge is a prerequisite to filing suit, Plaintiff's case must be dismissed.

Plaintiff cites the Supreme Court case of Scarborough v. Principi as support for his position. 541 U.S. 401 (2004). That case involves a plaintiff's amendment to an application for attorney's fees and costs pursuant to the Equal Access to Justice Act (28 U.S.C. § 2412) ("EAJA") Id. at 401. In that case, when filing an initial timely application for fees, the plaintiff's counsel failed to include the allegation required by statute that "the position of the United States was not substantially justified." Id. at 405. Once the government filed a motion to dismiss, the attorney filed an amended application including the allegation, but not before the 30-day deadline for filing the application had expired. Id. The Court, in allowing relation-back of the amendment, stated that the allegation requirement in 28 U.S.C. § 2412 is similar to the verification requirement examined in Edelman because it serves to prevent frivolous litigation. Id. at 415. The Court found that the relation-back doctrine should apply because it would serve Congress' purpose in enacting the EAJA to reduce the cost of potential litigation as a factor in a party's decision whether to challenge unjust government action. Id. at 417.

Scarborough is not applicable to this case. In Scarborough, the plaintiff filed an application with the Court of Appeals for Veterans Claims (CAVC) and filed an amendment while the case was still pending before the CAVC. Id. at 409. Thus, there remained a pending application that was capable of being amended at the time of amendment. Id. at 409.

That is not the situation in the *12 instant case, where the EEOC long ago closed its file on Plaintiff's charge.

In addition, cases where courts have allowed a suit based on an unverified EEOC charge to proceed because the employer would not be prejudiced are not persuasive in this situation. In Buck v. Hampton Township School District, for example, the Third Circuit allowed a discrimination suit under the ADA to proceed where the plaintiff failed to verify her EEOC charge prior to suit. 452 F.3d 256 (3d. Cir. 2006). The court found that because the employer received a notice and copy of the unverified EEOC charge prior to the lawsuit and responded to it on the merits without raising the issue that it was unverified, the employer waived its right to assert in court plaintiff's failure to verify the charge as a bar to suit. Id. at 262; see also McWilliams v. Latah Sanitation, Inc., 149 Fed. Appx. 588, 590 (9th Cir. 2005) (holding that a plaintiff should be allowed to file a late verification of his charge, even after the EEOC has issued a right to sue notice, because the employer received adequate notice of the charge and would not be prejudiced by the late verification). In the instant case, Plaintiff not only filed an unverified charge, but the EEOC closed its file because Plaintiff failed to provide information or cooperate such that the EEOC would be able to resolve the charge. [See Doc. #1, at 11]. Allowing Plaintiff to verify the charge at this late stage would defeat the purposes of the verification requirement and would prejudice Defendants, who had no adequate opportunity to resolve the issue prior to litigation.

*13 IV. Summary

The Court having carefully reviewed the parties' filings, Defendants' motion for summary judgment [Doc. #17] is GRANTED.

SO ORDERED, this __25__ day of September, 2008.

s/ Orinda D. Evans
United States District Judge

II. STATUTES AND REGULATIONS

APPENDIX C

FEDERAL STATUES

42 U.S.C. § 2000e-5

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable

cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the

requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto

upon receiving notice thereof, no charge may be filed under subsection (a) [FN1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be

extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to

subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of

this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought

within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the

complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
(Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104; Pub.L. 102-166, Title I, §§ 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1079; Pub.L. 111-2, § 3, Jan. 29, 2009, 123 Stat. 5.)

42 U.S.C.A. § 12102

Definition of disability

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully

correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329; Pub.L. 110-325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

APPENDIX D

EXCERPTS OF HISTORICAL AND STATUTORY NOTES, 42 U.S.C. 2000e-5

Revision Notes and Legislative Reports

1964 Acts. Senate Report No. 872 and House Report No. 914, see 1964 U.S. Code Cong. and Adm. News, p. 2355.

1972 Acts. House Report No. 92-238 and Conference Report No. 92-899, see 1972 U.S. Code Cong. and Adm. News, p. 2137.

1991 Acts. House Report No. 102-40 (Parts I and II), Interpretive Memorandum, and Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 549.

Amendments

2009 Amendments. Subsec. (e)(3). Pub.L. 111-2, § 3, added par. (3).

1991 Amendments. Subsec. (e). Pub.L. 102-166, § 112, designated existing text as par. (1) and added par. (2).

Subsec. (g). Pub.L. 102-166, § 107(b), designated existing text as pars. (1) and (2)(A), and added par. (2)(B).

Subsec. (k). Pub.L. 102-166, § 113(b), included expert fees within allowable costs.

1972 Amendments. Subsec. (a). Pub.L. 92-261, § 4(a), added subsec. (a). Former subsec. (a) was redesignated (b) and amended.

Subsec. (e). Pub.L. 92-261, § 4(a), redesignated former subsec. (d) as (e) and, as so redesignated, extended from ninety to one hundred and eighty days after the occurrence of the alleged unlawful employment practice the time for filing charges under this section and from two hundred and ten to three hundred days the time for filing such charges where the person aggrieved initially instituted proceedings with a State or local agency, and added the requirement that notice of the charge be served on the respondent within ten days after filing. Former subsec. (e) was redesignated (f)(1).

Subsec. (f). Pub.L. 92-261, § 4(a), redesignated former subsec. (e) as par. (1) and, as so redesignated, substituted provisions setting forth the procedure for civil actions where the Commission was unable to secure from the respondents a conciliation agreement to prevent further unlawful employment

practices for provisions setting forth the procedure for civil actions where the Commission was unable to obtain voluntary compliance with this subchapter and added provisions setting forth the procedure for civil action where the respondent is a government, governmental agency, or political subdivision and the Commission could not secure a conciliation agreement, added par. (2), redesignated former subsec. (f) as par. (3), and, as so redesignated, substituted "aggrieved person" for "plaintiff", and added pars. (4) and (5).

Congressional Findings

Pub.L. 111-2, § 2, Jan. 29, 2009, 123 Stat. 5, provided that:

"**Congress finds the following**:

"(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

"(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

"(3) With regard to any charge of discrimination under any law, nothing in this Act [The Lilly

Ledbetter Fair Pay Act, Pub.L. 111-2, Jan. 29, 2009, 123 Stat. 5, which amended this section, 29 U.S.C.A. §§ 626, 633a, and 794a, and 42 U.S.C.A. § 2000e-16, and enacted provisions set out as notes under this section and 42 U.S.C.A. § 2000a] is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

"(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid."

Excerpts from PL 110-325, September 25, 2008, 122 Stat 3553

SECTION 1. SHORT TITLE.

This Act may be cited as the "ADA Amendments Act of 2008".

<< 42 USCA § 12101 NOTE >>

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.--Congress finds that--

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so

because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

*3554
(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with

congressional intent, by expressing too high a standard.

(b) PURPOSES.--The purposes of this Act are--

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

REGULATIONS

APPENDIX E

29 C.F.R. § 1601.9.

Form of charge.

A charge shall be in writing and signed and shall be verified.

29 C.F.R. § 1601.12 Contents of charge; amendment

of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be

amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

MEMORANDA OF UNDERSTANDING

The U.S. Equal Employment Opportunity Commission

August 13, 2007

MEMORANDUM

TO: All District, Field, Area, and Local Office Directors
Regional Attorneys

FROM: Nicholas M. Inzeo, Director
Office of Field Programs

Ronald S. Cooper
General Counsel

SUBJECT: Timely Notification to Respondents of Receipt of Intake Questionnaires or other Correspondence Constituting Charges

The Supreme Court will be considering a case raising the issue of whether a minimally sufficient intake questionnaire that manifested the complainant's intent to file a charge constitutes a charge for timeliness purposes, even though the EEOC failed to docket it and notify the employer. *See Federal Express Corp. v. Holowecki,* No. 06-1322 (U.S.). Although the Court of Appeals found the questionnaire to be a charge, the district court in this case, as well as another circuit court, held that in these circumstances a questionnaire does not constitute a charge, resulting in the loss of the plaintiff's suit rights.

Our field office neglected to send a timely notice of the intake questionnaire. That situation should not have occurred, and this guidance is intended to insure that timely notice of charges is sent. An intake questionnaire or other correspondence can constitute a charge under the statutes we enforce if it contains all the information required by EEOC regulations governing the contents of a charge and constitutes a clear request for the agency to act. EEOC Compl. Man., Vol. I, §§ 2.2(b) and 2.7.

Under the statutes EEOC enforces, we are required to provide notification to the respondent once we receive a charge. Title VII and the ADA provide for EEOC to notify respondents within 10 days of receiving a charge. The ADEA similarly provides for EEOC to provide "prompt" notice of a charge. Accordingly, if it appears that a perfected charge cannot be docketed and served within ten days of receipt of a correspondence meeting the minimal

requirements of a charge, be it a letter or intake questionnaire; staff must take steps to promptly ascertain whether the submitter intended to initiate proceedings and, if so, docket the questionnaire or other correspondence as a charge and serve notice on the respondent within ten days of receipt. Intent can be inferred from a plain reading of the correspondence or determined by contacting the author/submitter. Staff should send respondent notice by mailing a Form 131 accompanied by the charge or by mailing only Form 131 (in situations where sending the charge "would impede the law enforcement function of the Commission)."

These instructions should be sent to all Enforcement and Legal Staff.

This page was last modified on September 11, 2007.

III. OTHER MATERIALS PETITIONER BELIEVES ESSENTIAL TO UNDERSTAND PETITION

APPENDIX F

Excerpts from EEOC Form 161 (3/98) dated 5/22/2007:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Hugh Butler
461 Jackneely Road
Covington, GA 30016

From: Atlanta
District Office

☐ On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))

EEOC Charge No.	EEOC Representative
410-2007-2257	Rose-Marie Stewart, Investigator

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statues enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☒ Having been given 30 days in which to respond, you Failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You were given 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☐ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

-NOTICE OF SUIT RIGHTS-
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed <u>WITHIN 90 DAYS</u> of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for

filing suit based on a state claim may be different.) [emphasis in original]

On behalf of the Commission

s/Bernice Williams-Kimbrough — 5/22/2007
Director — *(Date Mailed)*

Enclosure(s)

cc: Benjamin H. Banta, Esq.
Attorney at Law
Sandra Jackson Sheppard, Esq.
Attorney & Counselor at Law

Excerpts from EEOC Charge No. 410-2007-02257:

*1 SHEPPARD AND ASSOCIATES
Attorneys & Counselors at Law

455 Park Avenue, S.E. *(404) 622.5777*
Atlanta, Georgia 30312 *(404) 622-5577 Fax*

EEOC CHARGE NO. 410-2007-02257

RECEIVED
FEB 22 2007
EEOC-ATDO

EEOC CHARGE ON BEHALF OF COMPLAINANT

NAME *(Indicate Mr., Ms., Mrs.)* Mr. Hugh Butler		HOME TELEPHONE *(Include Area Code)*
STREET ADDRESS		DATE OF BIRTH
Named Is The Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State Or Local Government Agency Who Discriminated Against Client *(If more than one list below.)*		
NAME Greif, Inc.	NUMBER OF EMPLOYEES, MEMBERS > 15	TELEPHONE *(Include Area Code)*
STREET ADDRESS 2002 Lithonia Industrial Blvd. Lithonia, GA 30058		COUNTY Dekalb
CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es)* ☐Disability ☐Retaliation		DATE DISCRIMINATION TOOK PLACE Earliest Latest 08/31/2006

I. HUGH T. BUTLER, SR.'S STATEMENT OF FACTS

Hugh T. Butler, Sr. ("Butler") is a citizen of the State of Georgia who worked as a machinist/electrician/group leader for defendant Greif Bros. Service Crop. ("Greif or "company") most of the years from 1984 until Greif placed him on medical leave of absence effective August 16, 2004. Butler injured his back at work in 200[illegible] and was treated and diagnosed with a degenerative back condition. Butler did not seek medical treatment

immediately at the request of Greif's operations *2 manager at the plant, Robert Michael Ogilvie. However, Butler continued to have problems with his back until he could no longer tolerate the pain and insisted that he be approved for medical treatment. Butler was out on a FMLA leave for about three weeks in January 2003, and during this time, he was treated for his back condition. Upon returning to work, Butler provided the M.R.I. document showing he had a degenerative back condition. Butler followed his doctor's instructions regarding therapy and watched how he worked. To avoid further injury to his back, Butler utilized the job aids in the form of equipment provided by Greif to assist machinist/electricians to lift heavy and awkward objects, and Butler used the safety practices that he learned from the company's safety training videos. In this manner, Butler was able to continue to perform all the essential functions of his job, and did not have to make any special requests for accommodations until Greif placed the machinist/electricians in the pool of employees to provide break relief to press operators in June 2004. Butler reminded Greif of his back condition and the medical documentation already in his personnel file. However, Greif decided Butler needed a functional capacity evaluation and sent him to the company doctor, who, while in the process of evaluating Butler, determined Butler could not bend his back. The company doctor ceased the evaluation and told Butler he would to obtain a list of restrictions from his private physician, and. Greif reiterated the company doctor's instructions. Butler went to his treating physician who provided the work restrictions which included "0 bending" among other

weight-limiting restrictions. Upon reviewing the restrictions, Greif changed its position and was no longer concerned about Butler doing break relief duty, but instead, concluded Butler was no longer fit to perform the essential functions of his machinist/electrician job. Greif did not base its decision on any objective job performance, and since August 6, 2004, Greif refused to allow Butler to return to work, from a previously scheduled vacation, utilizing the same job aids and safety practices that he used before Greif saw the work restrictions. Greif insists that Butler could return to work if he could obtain a work release with restrictions or a set of restrictions that were less severe. Butler believed Greif ***3** discriminated against him because of his disability and filed an EEOC Charge, No. 110-2004-04330, on or about August 16, 2004. EEOC issued its Dismissal and Notice of Rights to sue on or about August 30, 2004. Butler filed a lawsuit in U.S. District Court on or about November 30, 2004, Case No. 1:04-cv¬3502-ODE, and in February of 2005, Butler filed an amended complaint alleging Greif failed to comply with the ADA reasonable accommodations provisions, Greif constructively discharged him based on his back disability, and Greif retaliated against him for exercising his statutorily protected expression. Butler further alleged that Greif failed to comply with the ADA reasonable accommodations provisions. In the course of a three-day trial, only Butler put on evidence before the jury, while Greif engaged in cross-examination of the witnesses. On August 30, 2006, the Court rendered a directed verdict in favor of Greif. On or about August 31, 2006, Greif sent a letter to Butler terminating his

employment Butler appealed the District Court's decision to the United States Circuit Court of Appeals for the Eleventh Circuit, Case No. 06-15274-BB, and the case is presently awaiting an appellate decision.

II. Butler believes Robert Michael Ogilvie and Greif discriminated against him by discharging him on or about August 31, 2006, shortly after part of the protected activity ended on August 30, 2006, as the protected activity is currently in the appellate court. Ogilvie and Greif's actions are in violation of the ADA and Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. sec. 2000e et seq.

Respectfully submitted February 20, 2007,

s/ Sandra Jackson Sheppard
Georgia Bar No. 641967
Attorney for Complainant

Excerpts from EEOC letter concerning receipt of verification:

April 10, 2008

Ms. Sandra Jackson Sheppard
Sheppard & Associates
Attorneys & Counselors at Law
455 Park Avenue, S.E.
Atlanta, GA 30312

Re: EEOC Charge No. : 410-2007-02257

Butler v. Greif, Inc.

Dear Ms. Sheppard:

This letter will acknowledge receipt on March 25, 2008, of the verification of the above-referenced charge. Enclosed is a date-stamped copy for your records.

Sincerely,
s/ Rose-Marie Stewart
Senior Investigator

Excerpts from Enclosures to EEOC letter dated April 10, 2008:

Enclosure 1:

RECEIVED
MARCH 25, 2008
EEOC-ATDO

March 25, 2008

Ms. Mary L. Scott, Supervisor
EEOC, Charge Receipt/Technical Information Unit
100 Alabama Street, SW, Suite 4R30
Atlanta, GA 30303

Re: Hugh Butler, Complainant

Dear Ms. Scott:

Please file the enclosed Amended EEOC Charge No. 410-2007-02257 on behalf of my client, Hugh Butler and return the extra copy stamped "Received" to me in the enclosed self-addressed and stamped envelope. Thank you.

Sincerely,

s/ Sandra Jackson Sheppard
Encl:as

Enclosure 2, Excerpts from Amended EEOC Charge:

*1 SHEPPARD AND ASSOCIATES
Attorneys & Counselors at Law

455 Park Avenue, S.E. *(404) 622.5777*
Atlanta, Georgia 30312 *(404) 622-5577 Fax*

EEOC CHARGE NO. 410-2007-02257

RECEIVED
MARCH 25, 2008
EEOC-ATDO

AMENDED EEOC CHARGE ON BEHALF OF COMPLAINANT

Complainant, Hugh Butler, by and through his attorney of record, Sandra Jackson Sheppard, files this Amended EEOC Charge to cure any technical

defects or omissions relating to the verification of the initial EEOC Charge, received by EEOC on February 22, 2007 and assigned the Charge Number 410-2007-02257, by including the Verification to the initial EEOC Charge as set forth below. Complainant requests the EEOC to accept the Verification and relate it back to the initial EEOC Charge filed February 22, 2007. See, *Edelman v. Lynchburg College*, 535 U.S. 106, 107, 122 S.Ct. 1145, 1146 (2002); *Pijnenburg v. West Georgia Health System, inc.*, 255 F.3d 1304, 1307 (11th Cir. 2001) (It is equally clear that a regulation of the EEOC allows a timely-filed charge to be amended for technical defects at a later date while retaining the original filing date), citing "Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b).

***5 VERIFICATION OF CHARGE**

On this day, Sandra Jackson Sheppard appeared before me, the undersigned notary public. After I administered an oath to her, she said that she prepared the initial EEOC Charge on behalf of her client, Hugh Butler, based upon information obtained from Hugh Butler and based upon information obtained from the records of Hugh Butler's former case file in the U. S. District Court for the Northern District of Georgia, Civil Action No. 1:04-CV-3502-ODE and that she verifies to the best of her knowledge, information, and belief, formed

after an inquiry reasonable under the circumstances, the facts stated in the Charge are true and correct.

s/ Sandra Jackson Sheppard
SWORN TO and SUBSCRIBED before me by Sandra Jackson Sheppard on 3/25/2008.

s/Marlena J. Beadles,
Notary Public in and for the State of Georgia

Excerpts from a blank copy of revised EEOC Form 161:

EEOC Form 161 (2/08)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: From: Atlanta District Office

☐ On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR § 1601.7(a))

EEOC Charge No. EEOC Representative

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statues enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans With Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☐ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other *(briefly state)*

-NOTICE OF SUIT RIGHTS-

* * *

Excerpts from Brief of Defendants-Appellees before Eleventh Circuit:

3. Speculation over Greifs handling of EEOC charge insufficient, and Buck case not persuasive, especially in these circumstances

Butler engages in speculation over, and tries to use inferences in an effort to figure out, how Greif responded to the EEOC: Did Greif somehow, or in some way, waive any argument (during the EEOC proceeding) that Butler's charge was not verified? (Butler's Initial Brief, pp. 11, 14, 28, 37.) This speculation-shaped argument by Butler should not suffice for three reasons. First, it is just that — ***16** speculation. Second, this argument was not made at the District Court level and, thus, should not be considered on appeal. *Albra*, 490 F.3d at 828 n.1 (citation omitted). Third, Butler had an absolute opportunity to develop this argument, while the case was pending at the District Court level, by submitting a Freedom of Information Act ("FOIA") request to the EEOC in order to obtain the EEOC' s investigative file and learn what Greif did or did not do during the EEOC proceeding. But Butler either did not make a FOIA request or else did not like the paperwork produced to him in response to his FOIA request. Either way, the fact that Butler could have developed evidence on this argument but did not do so — he admits on page 28 of his Initial Brief that his "record is not fully developed on all aspects of this issue" — is reason enough for this Court to reject this argument.[4]

[FN4] If Butler had developed a record on this argument, then the Company would have more to say.

In connection with his speculation over the Company's actions or inactions during the EEOC proceeding, Butler cites and relies on a Third Circuit decision that, at the District Court level, he did not point to: Buck v. Hampton

Township Sch. Dist, 452 F.3d 256 (3d Cir. 2006). (Butler's Initial Brief, pp. 24-28, 30-31; Rec. Vol. 1, Doc. 18-1, pp. 1-4.) That decision, of course, is not binding on this Court. And this Court should not follow Buck for several different reasons:

***17** ■ Buck does not appear to be "good law" because it contradicts the Third Circuit's prior affirmation of Danley, supra. In Danley, a federal district court in Pennsylvania specifically "h[e]ld that a private litigant cannot maintain a Title VII claim where his or her EEOC charge was not verified prior to the EEOC's issuance of a right to sue letter. When the EEOC has issued its right to sue letter and closed its file, it is not possible for a plaintiff to verify a previously unsworn charge." Danley, 921 F. Supp. at 1354. On appeal, the Third Circuit affirmed that decision — almost a decade before Buck. Danley, 107 F.3d 861 (3d Cir. 1997) (table) (No. 96-7302). Buck, therefore, is of no or very limited value.

■ There is no statutory provision, nor is there any EEOC regulation, which says that an unverified charge is sufficient if the employer responds to it with a statement of position (with or without a reservation of defenses) or in some other manner.

■ If the EEOC serves an unverified charge on an employer and asks the employer to submit a statement of position in response to the charge, then the employer is put in a difficult spot. If the employer is prudent and has the goal of winning — a reasonable ***18** goal, particularly if it knows that it did not discriminate or retaliate — then it has two viable options. On one hand, it could refuse to submit a statement of position, taking the position that the charge is not verified and, therefore, not valid (meaning that no response is required); or on the other hand, it could go forward and submit a statement of position with an express non-waiver of

all defenses, procedural and substantive. The former option is problematic in that it might very well alert the EEOC and the charging party of the charge's deficiency and, in turn, ultimately effect the charge's verification. In other words, the employer would be aiding the charging party — and, in the process, undermining its own defense — by pointing out the statutory deficiency with the charge. An employer should not be saddled with that obligation, for it is the charging party s burden and duty (with, presumably, guidance and, if necessary, prodding from the EEOC) to see that his charge is verified. Turning to the latter viable option — an option that does not impose an unrealistic and unfair obligation on an employer — if the employer were to submit a statement of position in response to the charge, reserving ***19** procedural defenses in the process, then the employer would be responding to the charge in an appropriate way, without harming its own case. The Buck decision misses the mark by failing to understand this reality and by effectively saddling the employer with a duty to harm its defense to an unverified charge.

■ An employer is not privy to all that the EEOC has in its possession. If the EEOC sends notice of a charge (along with a copy of the charge) to an employer and sets a deadline for the employer's statement of position — a standard course of action then the employer can be more than reasonably sure, even if the charge document itself is unverified, that the charge has been verified in some way. Why? Because the EEOC itself says that "[t]he complainant must submit a verified charge before the agency will require a response from the employer." Edelman, 535 U.S. at 115 n.9, 122 S. Ct. at 1150 n.9. The EEOC frequently obtains affidavits from charging parties, and for all that the employer knows, the affidavit (or some other similar document) tracks the language of the charge, was attached to the charge that was filed with the EEOC, but was not attached to the charge that ***20** was served on the employer (employers are not

permitted to see charging parties' affidavits, intake questionnaires or the like unless and until they submit a FOIA request after suit is filed). Only the EEOC knows exactly what it does, and does not, have in its arsenal; and presumably the EEOC would not be asking the employer to submit a statement of position if its house, so to speak, were not in order (i.e., if it did not have a verified charge in its possession). An employer who is interested in avoiding an adverse "cause" finding[5] by the EEOC — in other words, all employers — could be well-served by explaining its position on the merits (i.e., why the complained-of job action was not discriminatory or retaliatory) while reserving all defenses, as opposed to speculating or guessing (perhaps wrongly) that the filing paperwork is not perfected.[6] Such is all the more true

[FN 5] A "cause" finding is where the EEOC determines that there is reasonable cause to believe that discrimination or retaliation occurred. Practically speaking, a charging party is more likely to sue — much more likely — on the heels of a "cause" determination than on the heels of a finding of no reasonable cause to believe that discrimination or retaliation occurred. Thus, one of the employer's chief goals at the EEOC phase is to obtain a "no reasonable cause" finding.

[FN6] Sometimes, a copy of the charge is not required to be served by the EEOC on the employer (29 C.F.R. § 1601.14) — a fact that illustrates all the more why an employer should not be compelled to insist on certain things that, for all it knows, are not required or else have been satisfied.

*21 when, as here, an attorney is involved in the charge-filing process on the charging party's side.

■ Buck is rooted in equity-related evidence that is not before this Court. Whereas in Buck the evidence showed what the respondent-employer did in response to the charging party's

EEOC charge (Buck, 452 F.3d at 264-65), no similar evidence is in the record in the instant case. Accordingly, it would be presumptuous to apply Buck here, especially considering that, from an equity standpoint, Butler was represented by counsel in the EEOC proceeding and, as discussed in the next subsection of this Brief, had previously filed a charge with the EEOC and, thus, was not a novice with the process.

E. Butler Not Being Denied 'Day in Court'

If this Court affirms the lower court, then will Butler be denied "his day in court"? The answer is "no," for two different reasons.

First, Butler has already had his day in court against Greif. As he acknowledges on page 9 of his Initial Brief, he previously sued Greif (after filing an ***22** EEOC charge), went to trial, and lost. If this Court has any concerns over how the Company treated Butler during the pendency of their employment relationship, then it should examine, in detail, the entire record in Civil Action No. 1:04-CV-3 502-ODE in the U.S. District Court for the Northern District of Georgia. That record will show that the Company: reasonably accommodated Butler by placing him on a leave of absence (as opposed to terminating him) after his physician completely restricted him from performing an essential function of his job (bending); prevailed on summary judgment on all but one of the multiple federal- and state-law claims that Butler asserted in his federal court lawsuit; obtained a judgment as a matter of law at trial (from District Judge Orinda Evans) on the one claim that survived summary judgment; and won on appeal to this Court (No. 06-15274). The instant case — Butler's second suit against Greif (which the Company successfully had transferred to District Judge Evans after it was initially assigned to a different judge) — derives from the Company's decision to

separate Butler from employment after its victory at trial. Butler contends in this suit that his separation was retaliatory, and his counsel flat-out wrongly asserts on page 10 of Butler's Initial Brief that the Company's separation letter (by which it informed Butler, who was out on a leave of absence for two-plus years, that he was being separated from employment) referenced the trial from the prior suit. To the contrary, the letter referenced not the trial but a collective ***23** bargaining agreement that governed the terms and conditions of Butler's employment and that mandated his separation from employment due to the extreme length of his leave. (Rec. Vol. 1, Doc. 20, p. 3.) While it is not this Court's assignment now to delve into the substantive merits of this case, Butler opened the door, so to speak, to this discussion by falsely characterizing the separation letter; and there is nothing more legitimate, neutral, non-discriminatory and non-retaliatory than an employer (like Greif) following the specific terms of a collective bargaining agreement that was negotiated by a union on behalf of represented employees (like Butler).

The second reason why Butler is not being unfairly denied his day in court is that he had more than ample opportunity to file a verified EEOC charge. He was separated from employment — and notified of his separation by mail — on August 31, 2006 (Rec. Vol. 1, Doc. 20, p. 3); yet he waited (most unnecessarily) more than five months to file a charge. As the EEOC did not dismiss his charge until May 22, 2007, Butler had about nine months (from the job action at issue to the EEOC's dismissal) to verify his charge. Also, in the wake of the EEOC's dismissal for failure to cooperate, Butler or his counsel could have tried to take steps to see why the charge was dismissed so that they could rectify any shortcomings on their part. But none of those things happened before Butler filed suit; there is no record evidence that the EEOC re-opened the charge or reconsidered its dismissal based on some *** 24** effort or explanation by Butler

or his counsel. So in sum, Butler has had his opportunities — in the prior lawsuit and in the EEOC phase of this lawsuit. He has not been unjustly denied a day in court.
[emphasis in original]

* * *

Respectfully submitted,

s/Benjamin H. Banta
Ernest R. Malone, Jr.
Counsel for the Defendants-Appellees

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No. 09-42

Supreme Court, U.S.
FILED
AUG 10 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HUGH T. BUTLER, SR.,

Petitioner,

v.

GREIF, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Eleventh Circuit correctly affirmed summary judgment to the Respondent, Greif, Inc., because the Petitioner, Hugh T. Butler, Sr., failed to submit a verified charge of discrimination – which is required by statute – to the U.S. Equal Employment Opportunity Commission before the Commission dismissed Butler's non-verified charge and closed its investigation.

PARTIES TO PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to the two parties named in the caption, Michael Ogilvie, Jr. was identified as a party – an Appellee – in the proceeding below (in the U.S. Court of Appeals for the Eleventh Circuit). However, Ogilvie's dismissal from this action was neither contested at the U.S. District Court level (where Ogilvie was a Defendant) nor appealed to the Eleventh Circuit; so he is no longer a party to this action.

The Respondent, Greif, Inc. (stock ticker symbol "GEF"), does not have a parent corporation. No publicly held company owns 10% or more of either the voting stock or, to the best of the corporation's knowledge, the non-voting stock of Greif, Inc.

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OPINIONS AND ORDERS BELOW

For the Opinion by the U.S. Court of Appeals for the Eleventh Circuit, *see* 2009 U.S. App. LEXIS 7734 (11th Cir. Apr. 8, 2009). As for the Order by the U.S. District Court for the Northern District of Georgia (Case No. 1:07-cv-01978-ODE, Doc. #25, filed 09/26/2008), it is not reported but is set forth on pages 5-18 of the Petitioner's Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1). The Opinion by the U.S. Court of Appeals for the Eleventh Circuit was issued on April 8, 2009, and the petition for a writ of certiorari was filed with this Court 90 days later, on July 7, 2009. Thus, the petition is timely pursuant to Supreme Court Rule 13.1.

STATUTES AND REGULATIONS AT ISSUE

42 U.S.C. § 2000e-5(b)
42 U.S.C. § 2000e-5(e)(1)
42 U.S.C. § 12117(a)
29 C.F.R. § 1601.7(a)
29 C.F.R. § 1601.9
29 C.F.R. § 1601.12(b)
29 C.F.R. § 1601.14(a)

The above statutes and regulations are set out verbatim in the Petitioner's petition or appendix,

except for 42 U.S.C. § 12117(a), 29 C.F.R. § 1601.7 and 29 C.F.R. § 1601.14, which state:

> *42 U.S.C. § 12117. Enforcement*
>
> (a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106 [42 U.S.C. § 12116], concerning employment.
>
> *29 C.F.R. § 1601.7 Charges by or on behalf of persons claiming to be aggrieved.*
>
> (a) A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of [T]itle VII or the ADA may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name, address and telephone number of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the

authorization of such charge by the person on whose behalf the charge is made. Any such person may request that the Commission shall keep his or her identity confidential. However, such request for confidentiality shall not prevent the Commission from disclosing the identity to Federal, State or local agencies that have agreed to keep such information confidential. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests for such information.

29 C.F.R. § 1601.14 Service of charge or notice of charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

STATEMENT OF THE CASE

This is an employment discrimination lawsuit between the Petitioner, Hugh T. Butler, Sr. ("Butler"), and the Respondent, Greif, Inc. ("Greif" or "the Company").[1] Before filing this suit, Butler's counsel submitted, on Butler's behalf, a charge of discrimination to the U.S. Equal Employment Opportunity Commission ("EEOC") on February 20, 2007.[2] In the charge, Butler (through his counsel) alleged that Greif unlawfully discriminated and retaliated against him by terminating him from employment on August 31, 2006.[3]

Although the EEOC charge was signed by Butler's counsel, it was not verified.[4] In fact, as Butler admits, the charge was never verified during the time period when it was pending before the EEOC.[5]

On May 22, 2007, the EEOC issued a "Dismissal and Notice of Rights" to Butler.[6] In that document, the EEOC stated that it was dismissing the charge because of a failure to cooperate by Butler.[7]

---

[1] Petitioner's Appendix ("App.") at 2.

[2] App. at 2, 46-50.

[3] App. at 46-50.

[4] *Id.*

[5] Butler's petition at 3, 6-7.

[6] App. at 43-46.

[7] App. at 44.

After receiving the EEOC's "Dismissal and Notice of Rights," Butler filed this lawsuit – in which he claims only unlawful retaliation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12203 – against Greif in the U.S. District Court for the Northern District of Georgia on August 17, 2007.[8] On March 13, 2008, the Company filed a motion for summary judgment, asserting that Butler could not sustain his lawsuit because he had failed to submit a *verified* charge to the EEOC prior to filing suit.[9]

Butler filed an opposition to the summary judgment motion.[10] In addition to the opposition, Butler (through his counsel) submitted a verification to the EEOC on or around March 25, 2008.[11] But that verification was submitted to the EEOC almost one year after the EEOC had issued its "Dismissal and Notice of Rights" and had closed its investigation.[12] And there is no evidence in the record that the EEOC did anything with the verification, other than simply stamp it as "RECEIVED."[13]

On September 26, 2008, the District Court granted Greif's motion for summary judgment and

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[8] App. at 5, 8.

[9] App. at 9.

[10] *Id.*

[11] App. at 9, 51-54.

[12] *Compare* App. at 43-46 *with* App. at 51-54.

[13] App. at 51-54.

entered judgment in the Company's favor.[14] Butler then filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit") on October 24, 2008.[15]

On April 8, 2009, the Eleventh Circuit unanimously affirmed the District Court's summary judgment award.[16] Butler then filed the petition at issue with this Court on July 7, 2009.[17]

ARGUMENT

The Eleventh Circuit correctly ruled, as did the District Court, that Butler could not sustain his lawsuit because his underlying EEOC charge was *not verified*, as required by *statute*.

I. EEOC Charge Must Be Verified

With respect to the administrative prerequisites to filing a lawsuit, the ADA follows the procedural mechanisms of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*. *See* 42 U.S.C. § 12117(a). Under Title VII, a plaintiff must first file a charge with the EEOC before filing a claim in court. 42 U.S.C. § 2000e-5(e)(1). The charge does

[14] App. at 5-18.

[15] Rec. Vol. 1, Doc. 27.

[16] App. at 1-5.

[17] Butler's petition.

not need to be filed by the complainant himself but can be filed by someone else "on behalf of [the] person claiming to be aggrieved," *id.* § 2000e-5(b), meaning that, for example, an attorney can submit a charge for his or her client. However, no matter who files the charge, Title VII explicitly states that the charge "*shall* be in writing *under oath or affirmation*. . . ." *Id.* (emphasis added).

In addition to the above *statutory* requirement that a charge *must* be verified, the EEOC has issued regulations on the form of charges and what they *must* contain. *See* 29 C.F.R. § 1601.1 *et seq.* One of the regulations states unambiguously that a charge "shall be in writing and signed and *shall be verified*." 29 C.F.R. § 1601.9 (emphasis added).

II. Butler's EEOC Charge Not Verified

Neither Butler nor his counsel submitted a verified charge to the EEOC before filing this action in court. Based on that undisputed fact, the District Court correctly granted – and the Eleventh Circuit correctly affirmed (unanimously) – summary judgment in favor of Greif.

III. Butler's Belated Verification Fails

Butler argues that his belated verification – submitted to the EEOC almost a full year after that agency had dismissed his charge and closed its investigation – should "relate back" to the date when

he filed his charge, the effect being that his lawsuit would be revived. Butler's argument should be rejected, and his petition should be denied, for four main reasons.

A. Case Law Supports Greif

Several courts have held or said that a person's opportunity to verify his charge *ends* when the EEOC dismisses the charge. *See Balazs v. Liebenthal*, 32 F.3d 151, 156-57 (4th Cir. 1994); *Reynolds v. Solectron Global Servs.*, 358 F. Supp. 2d 688, 693 n.9 (W.D. Tenn. 2005); *Hazeur v. Federal Warranty Serv. Corp.*, No. Civ.A. 99-3156, 2000 WL 365013, at *2 (E.D. La. Apr. 7, 2000); *Danley v. Book-of-the-Month Club, Inc.*, 921 F. Supp. 1352, 1353-55 (M.D. Pa. 1996), *aff'd*, 107 F.3d 861 (3d Cir. 1997) (table) (No. 96-7302); *Bacon v. Allstate Ins. Co.*, No. 93 C 1701, 1995 WL 360736, at *3-*8 (N.D. Ill. June 14, 1995).

If the verification from Butler's counsel had been submitted to the EEOC *prior to* the EEOC's dismissal of the charge on May 22, 2007, then Butler's "relation back" argument would have winning traction under *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). But Butler submitted his verification to the EEOC *more than 10 months after the EEOC's dismissal of the charge*. As explained in the rulings cited in the preceding paragraph, Butler's opportunity to verify his charge *ended* when the EEOC dismissed his charge and closed its investigation.

Balazs involves strikingly similar facts to the instant case and was relied on by both the Eleventh Circuit and District Court below. (*See* App. at 4, 14-16.) It is quoted in substantial part as follows:

> . . . [T]here is presented squarely for decision here the question of whether the attempted amendment of plaintiff's March 30, 1993 charge sufficed to perfect it and support the maintenance of this action notwithstanding the attempted amendment was not filed until almost four months after the EEOC had issued plaintiff its right to sue letter, had terminated its processing of the charge, this action has been instituted and defendants had filed and served plaintiff with a motion to dismiss based on the non-verification of the EEOC charge.
>
> * * *
>
> . . . Plaintiff . . . relies principally on an EEOC regulation, 29 C.F.R. § 1601.12(b) (1988). He argues that the charge filed by him on March 30, 1993 was timely amended, that the amendment related back to the filing of the charge and that the district court's ruling to the contrary was clearly erroneous. The cited regulation states:
>
> > A charge may be amended to cure technical defects or omissions, including the failure to verify the charge. . . . Such amendments . . . will relate back to the date the charge was first received.

> . . . Although [this] regulation has heretofore been applied in many cases, not one of them involved a situation where, as here, the attempted amendment followed the issuance of a right to sue letter and the institution of suit.
>
> Plaintiff and the EEOC agree that the purpose of verification is to protect the employer from having to respond to frivolous charges, but that protection is lost once the right to sue letter issues and the employer is served with a lawsuit. At that point the employer's only choice is to defend the suit even if it is, as appears to be the case here, based at least in part on a charge not covered by Title VII. Carried to its logical conclusion, under the EEOC's interpretation of its regulation it would never be too late to verify a charge, and if this case had gone to trial and had resulted in a judgment from which appeal was taken, plaintiff's verification of his charge would have been timely if made while the case was pending in this [appeals] court.
>
> Such an absurd result was surely not what Congress had in mind when it enacted the statute nor what the EEOC had in mind when it adopted the regulation allowing a verification amendment to relate back to the time the charge was filed.
>
> Thus we conclude that a reasonable construction of the EEOC's regulation would simply allow charges to be verified and to

> relate back *only so long as the charge is a viable one in the EEOC's files, but that where, as here, a right to sue letter has issued, a suit has been instituted and the EEOC has closed its file, there is no longer a charge pending before the EEOC which is capable of being amended.* This construction of the regulation imparts certainty to the proceeding which is helpful to the parties and the court, and at the same time it complies with the statutory requirement of verification without undermining the EEOC regulation.

Balazs, 32 F.3d at 156-57 (emphasis added).

Here, the Eleventh Circuit correctly relied on the reasoning in *Balazs*, particularly in light of the fact that when the EEOC dismissed Butler's charge on May 22, 2007, it did so with this finding: "Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge." (App. at 43-46.) *That reason for dismissal goes hand-in-glove with Butler's failure to submit a verified charge to the EEOC.*[18] All told, between the date when Butler's charge was filed

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[18] *Cf. Edelman*, 535 U.S. at 115 n.9 ("[O]ur understanding is that the EEOC's standard practice is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further with the complaint.") (citing an *Amici Curiae* brief by the EEOC) (other citation omitted).

(February 22, 2007) and the date when the EEOC dismissed it (May 22, 2007), Butler had three months – *more than ample time* – to submit a verification but failed to do so. Accordingly, Butler's petition to this Court should be rejected.[19]

B. No Circuit Split

The question presented by Butler in his petition has been squarely decided by the Fourth (*Balazs*) and Eleventh (the instant case) circuits. Looking and hoping for a circuit split, Butler cites to *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968), *McWilliams v. Latah Sanitation, Inc.*, No. 04-35387, 149 Fed. Appx. 588 (9th Cir. 2005), and *Buck v. Hampton Township Sch. Dist.*, 452 F.3d 256 (3d Cir. 2006). (Butler's petition at 15-16, 20.) However, each of those cases is deficient in its own unique way with respect to Butler's effort to show a circuit split.

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[19] Notably, when Butler submitted the belated verification to the EEOC, there is nothing in the record to show that the EEOC did anything other than simply stamp it as "RECEIVED." It is *not* as if the EEOC re-opened the charge or issued a written communication stating that the verification related back to the date when the charge was filed. With the record showing only receipt by the EEOC, this Court is not faced with a scenario where the EEOC took affirmative action in an effort to effect the relation back of the verification (an effort that, Greif contends, would involve an unreasonable interpretation and abusive application of 29 C.F.R. § 1601.12(b)). The EEOC's *inaction* in this regard buttresses the Eleventh Circuit's decision and undercuts Butler's petition.

In *Choate*, the plaintiff filed an EEOC charge on March 14, 1966, and then put her charge under oath on June 27, 1966 – *before* the EEOC issued its dismissal letter on October 5, 1966. *Choate*, 402 F.2d at 358-61. So *Choate* did not involve, or address, the precise issue in this case: a plaintiff who puts his charge under oath *after* the EEOC dismisses the charge and closes its investigation.

As for *McWilliams*, it was – and is – an *unpublished* memorandum opinion that states at the outset: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3[20]." *McWilliams*, 149 Fed. Appx. at 589. In light of that fact, a Montana state court recognized, "*McWilliams* is not properly cited by Ninth Circuit rule and as such is not binding on Montana courts." *Wiman v. Fallon County*, Docket No. DV 2004-08, 2006 Mont. Dist. LEXIS 974, at *2 (Mont. Dist. Ct. June 22, 2006). Notably, *Wiman* seems to be the only court decision to have cited *McWilliams*, the latter of which was decided in 2005 – *before* Federal Rule of Appellate Procedure 32.1 was enacted in 2006 to provide that a court may not prohibit or restrict the citation of unpublished federal judicial opinions issued on or after January 1, 2007 (*i.e.*, *after* the *McWilliams* opinion was issued).

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[20] That rule limits or restricts the usage (citation) and value (weight) of unpublished opinions.

Finally, with regard to *Buck*, it comes from the same circuit (the Third Circuit) as *Danley*. In *Danley*, a federal district court in Pennsylvania specifically "h[e]ld that a private litigant cannot maintain a Title VII claim where his or her EEOC charge was not verified prior to the EEOC's issuance of a right to sue letter. When the EEOC has issued its right to sue letter and closed its file, it is not possible for a plaintiff to verify a previously unsworn charge." *Danley*, 921 F. Supp. at 1354. On appeal, the Third Circuit *affirmed* that decision (without an opinion) – *almost a decade before Buck*. *Danley*, 107 F.3d 861 (3d Cir. 1997) (table) (No. 96-7302). The Third Circuit, therefore, is not clearly in conflict with the Fourth and Eleventh circuits.

Buck also, importantly, is rooted in particular facts that have not been developed by Butler and that, thus, are not before this Court. Whereas in *Buck* there existed record evidence showing how the employer responded to the EEOC charge by "fil[ing] a lengthy and detailed response on the merits, without mentioning the plaintiff's failure to verify the charge, all *before* the EEOC issued its [dismissal and] right to sue letter," *Buck*, 452 F.3d at 262-65 (emphasis in original), no similar evidence was put in the record by Butler. Even if it had been, this Court should note that, from an equity standpoint, Butler was represented by counsel *before and during* the EEOC proceeding (*see* App. at 46-50) and, as discussed in the next subsection below, had previously filed a charge with the EEOC. Those two facts mean that Butler

was neither a lay complainant nor a novice at the EEOC stage.

In sum, there is no circuit split, or no circuit split of significance, that warrants the granting of Butler's petition based on the particular fact pattern and equity-related evidence in the record.

C. Butler Not Being Denied 'Day in Court'

To the extent that equity considerations come into play, this Court should note that its rejection of Butler's petition would not result in his being denied "his day in court," for two different reasons.

First, Butler has already had his day in court against Greif. As he acknowledges on pages 4-5 of his petition, he previously sued Greif (after filing a *verified* EEOC charge), went to trial, and lost. The record from that case – Civil Action No. 1:04-CV-3502-ODE in the U.S. District Court for the Northern District of Georgia – shows that the Company: reasonably accommodated Butler by placing him on a leave of absence (as opposed to terminating him) after his physician *completely restricted* him from performing an *essential function of his job* (bending); prevailed on summary judgment on all but one of the multiple federal- and state-law claims that Butler asserted in his lawsuit; obtained a judgment as a matter of law at trial on the one claim that survived summary judgment; and won on appeal to the Eleventh Circuit. The instant case – Butler's second

suit against Greif – derives from the Company's decision to separate Butler from employment after its victory at trial. That decision, as recognized (or hinted at) by Butler on pages 5-6 of his petition, was based on terms of nothing more neutral, legitimate, non-discriminatory and non-retaliatory than a *collective bargaining agreement* (Butler was on a leave of absence for so long – more than two years – that he lost his seniority and employment rights under the collective bargaining agreement between the Company and the union that represented a unit of employees, including Butler, at the Company's facility). (*See* Greif's Eleventh Circuit brief at 22-23.)

The second reason why Butler is not being unfairly denied his day in court is that he had more than ample opportunity to file a verified EEOC charge. Butler was separated from employment – and notified of his separation by mail – on August 31, 2006 (*see* App. at 49-50); yet he waited (most unnecessarily) more than five months to submit a charge to the EEOC. As the EEOC did not dismiss his charge until May 22, 2007, Butler had more than eight months (from the job action at issue to the EEOC's dismissal) to submit a verified charge to the EEOC. Also, in the wake of the EEOC's dismissal *for failure to cooperate*, Butler or his counsel could have tried to take steps to see *why* the charge was dismissed (if they really did not know the reason) so that they could rectify any shortcomings on their part. However, there is no record evidence that the EEOC re-opened the charge or reconsidered its

dismissal based on some effort or explanation by Butler or his counsel. What is clear, then, is that Butler either slept on his rights, so to speak, or disregarded them. Although he now seeks to be rescued from the fate that he ordained by his inaction, he presents neither a compelling legal nor equitable case for this Court to consider.

D. No Important Question of Federal Law

The question presented does not qualify as an important question of federal law. The general circumstance at hand (a complainant's failure to verify his EEOC charge before the EEOC dismisses the charge and closes its investigation) is rare. Even if this rare circumstance could be deemed important to some degree, that importance is diluted when the particular facts in the record here are considered (*e.g.*, the fact that Butler had previously filed a verified charge as a prerequisite to a prior suit, the fact that Butler was represented by counsel before and during the EEOC phase leading up to this suit).

CONCLUSION

Butler's petition for a writ of certiorari should be denied because the Eleventh Circuit correctly decided that his verification to the EEOC – which he submitted almost a year after that agency had dismissed his charge – was insufficient. Butler's petition also should be denied because this case does not involve

an important question of federal law, and there is no circuit split of significance based on the particular facts that are, and are not, in the record here.

Respectfully submitted,

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